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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LAWRENCE HENRY TROMP,

Defendant and Appellant.

E070705

(Super.Ct.No. SWF1401307)

OPINION

APPEAL from the Superior Court of Riverside County. Mark Mandio, Judge.

Conditionally reversed with directions.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant and appellant, Lawrence Henry Tromp, guilty as charged of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1);¹ count 1.) The jury also found that defendant personally used a dangerous or deadly weapon, a knife, in the assault (§§ 667, 1192.7, subd. (c)(23)), and that defendant personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)) on the victim, Mark C.

The assault occurred on April 24, 2014, when, suddenly and without provocation, defendant stabbed Mark C. in the chest while defendant, Mark C., and Mark C.'s mother were waiting at a bus stop in Hemet. After police apprehended defendant, an officer heard defendant say: ““Why did I stab him? I shouldn’t have stabbed him.”” Mark C. was hospitalized and later recovered from his stab wound, but the wound left scars on his chest.

In a bifurcated trial, the court found defendant had a prior 2003 conviction for attempted robbery, which was both a prior strike and a prior serious felony conviction. (§ 667, subs. (a), (c)-(e)(1).) Defendant was sentenced to 14 years in state prison: the middle term of three years, doubled to six years based on the prior strike, plus five years for the prior serious felony conviction, plus three years for the great bodily injury enhancement.

In this appeal, defendant claims: (1) he was entitled to 1,690 days of presentence custody credits, two more than the 1,688 days he was awarded at sentencing (§§ 2900.5, 2933.1); (2) the matter must be remanded to the court with directions to exercise the court’s new discretion to impose or not impose a five-year term on his prior serious felony conviction

¹ Undesignated statutory references are to the Penal Code.

(*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-973); and (3) the judgment must be conditionally reversed and the matter remanded for the court to determine whether he is eligible for mental health diversion (§ 1001.36; *People v. Frahs* (2018) 27 Cal.App.5th 784, 790-792, review granted Dec. 27, 2018, S252220 (*Frahs*)).

The People agree—and so do we—that defendant is entitled to two additional days of presentence custody credits. The People disagree that the matter must be remanded for resentencing on defendant’s prior serious felony conviction, because the court clearly indicated that it would not have exercised its discretion to strike the prior serious felony conviction. The People also disagree that the matter must be remanded to determine whether defendant is eligible for mental health diversion. The People argue section 1001.36 is not retroactive; it does not apply to persons like defendant who were tried, convicted, and sentenced before it went into effect on June 27, 2018. (Stats. 2018, ch. 34, § 24 (Assem. Bill No. 1810).) Thus, the People argue, defendant is not eligible for pretrial mental health diversion under section 1001.36.

We conditionally reverse the judgment and remand for further proceedings.

II. DISCUSSION

A. *Mental Health Diversion* (§ 1001.36)

The Court of Appeal is currently divided on the question of whether section 1001.36 applies retroactively to persons, like defendant, who were tried, convicted and sentenced before section 1001.36 went into effect on June 27, 2018. (Cf. *Frahs, supra*, 27 Cal.App.5th

at pp. 790-792 [§ 1001.36 applies retroactively] with *People v. Craine* (2019) 35 Cal.App.5th 744 [§ 1001.36 applies only prospectively].)

In *Frahs*, Division Three of this court concluded that section 1001.36 applies retroactively to all persons whose judgments, like defendant's, were not final when section 1001.36 went into effect on June 27, 2018. (*Frahs, supra*, 27 Cal.App.5th at pp. 790-791.) More recently, in *Craine*, the Fifth District Court of Appeal disagreed with the reasoning of *Frahs* and held that "section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing." (*People v. Craine, supra*, 35 Cal.App.5th at p. 760.) Defendant's case has been adjudicated and he has been sentenced, but the judgment is not final on appeal.

On December 27, 2018, the Supreme Court granted review in *Frahs* to determine whether section 1001.36 applies retroactively. Because the *Frahs* and *Craine* courts have thoroughly addressed the reasons for and against the retroactive versus prospective application of section 1001.36, it is unnecessary to discuss the retroactivity issue in detail. In sum, we agree with *Frahs* that the Legislature implicitly intended section 1001.36 to apply retroactively to all defendants whose judgments, like defendant's, were not final when section 1001.36 went into effect on June 27, 2018. (*Frahs, supra*, 27 Cal.App.5th at pp. 790-791.)²

² The Legislature amended section 1001.36, effective January 1, 2019, to provide that a defendant "may not be placed into a diversion program" pursuant to section 1001.36 if the defendant is currently charged with murder, rape, or another specified crime. (§ 1001.36, subd. (b)(2); Stats. 2018, ch. 1005, § 1 (Sen. Bill No. 215).) Defendant's current charge and conviction for assault by means of force likely to produce great bodily injury is not one of these specified crimes. (§ 1001.36, subd. (b)(2).)

Thus, we conditionally reverse the judgment and remand the matter for further proceedings in accordance with the procedures outlined in *Frahs*. The *Frahs* court adopted a conditional reversal and remand procedure which requires the court to “conduct a mental health diversion eligibility hearing under the applicable provisions of section 1001.36.” (*Frahs, supra*, 27 Cal.App.5th at p. 792.) “When conducting the eligibility hearing, the court shall, to the extent possible, treat the matter as though [the defendant] had moved for pretrial diversion after the charges had been filed, but prior to their adjudication.” (*Ibid.*) As discussed in *Frahs*, section 1001.36 sets forth six criteria for determining whether a defendant is eligible for pretrial diversion:

“First, the court must be ‘satisfied that the defendant suffers from a mental disorder’ listed in the statute. (§ 1001.36, subd. (b)(1).) Second, the court must also be ‘satisfied that the defendant’s mental disorder played a significant role in the commission of the charged offense.’ (§ 1001.36, subd. (b)(2).) Third, ‘a qualified mental health expert’ must opine that ‘the defendant’s symptoms motivating the criminal behavior would respond to mental health treatment.’ (§ 1001.36, subd. (b)(3).) Fourth, subject to certain exceptions, the defendant must consent to diversion and waive his or her right to a speedy trial. (§ 1001.36, subd. (b)(4).) Fifth, the defendant must agree ‘to comply with the treatment as a condition of diversion.’ (§ 1001.36, subd. (b)(5).) [Sixth] [a]nd finally, the court must be ‘satisfied that the defendant will not pose an unreasonable risk of danger to public safety . . . if treated in the community.’ (§ 1001.36, subd. (b)(6).)” (*Frahs, supra*, 27 Cal.App.5th at p. 789.)

“If [the] trial court determines that a defendant meets the six requirements, then the court must also determine whether ‘the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant.’ (§ 1001.36, subd. (c)(1)(A).) The court may then grant diversion and refer the defendant to an approved treatment program. (§ 1001.36, subd. (c)(1)(B).) Thereafter, the provider ‘shall provide regular reports to the court, the defense, and the prosecutor on the defendant’s progress in treatment.’ (§ 1001.36, subd. (c)(2).) ‘The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years.’ (§ 1001.36, subd. (c)(3).) [¶] If the defendant commits additional crimes, or otherwise performs unsatisfactorily in diversion, then the court may reinstate criminal proceedings. (§ 1001.36, subd. (d).) However, if the defendant performs ‘satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant’s criminal charges that were the subject of the criminal proceedings.’ (§ 1001.36, subd. (e).)” (*Frahs, supra*, 27 Cal.App.5th at pp. 789-790.)

We observe that nothing in the record indicates that remand for a section 1001.36 pretrial mental health diversion eligibility hearing will necessarily be futile. (Cf. *People v. McVey* (2018) 24 Cal.App.5th 405, 419.) Before trial, in January 2016, the court determined that defendant was not competent to stand trial and suspended the criminal proceedings. (§§ 1368-1370.) In August 2016, the court declared defendant’s competency restored and reinstated the proceedings. (§ 1372.)

Additionally, defendant's probation report, which was filed on May 24, 2018, indicates defendant has at least one qualifying mental health disorder. (§ 1001.36, subd. (b).) And, in sentencing defendant on May 24, 2018, the court said it believed that defendant had "mental illnesses" and told defendant: "If I could send you somewhere where you could be treated and I knew that was potentially likely to be successful and prevent you from doing this in the future, I would do that. [But] [t]hose options really aren't available to me." The court also noted that defendant was "on medication" when "this incident pop[ped] out of nowhere" and he assaulted Mark C. with a knife, nearly killing him. In denying defendant's *Romero*³ motion to strike his prior strike, the court noted that defendant had done well on parole, but that his 2003 attempted robbery conviction and his current aggravated assault conviction were violent crimes, he was "just too risky," and "right now," sending him to prison was the only option the court had to protect society.

At oral argument, the People claimed for the first time that defendant's prior strike conviction renders him ineligible for mental health diversion under the "Three Strikes" law, which expressly prohibits diversion for defendants found to have a prior strike conviction. (§ 667, subd. (c)(4).)⁴ But as Division One of this court has explained, this argument misconstrues the conditional reversal procedure of *Frahs*:

³ *People v. Superior Court (Romero)* 13 Cal.4th 497.

⁴ Section 667, subdivision (c)(4) provides: "Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior serious or violent felony convictions as defined in subdivision (d) [¶] . . . [¶] (4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted"

“The *Frahs* procedure conditionally reverses both the convictions and the sentence for an eligibility hearing under section 1001.36. (*Frahs*, *supra*, 27 Cal.App.5th at p. 792, rev. granted; see *id.* at p. 788 [defendant Frahs was also a striker].) Conditional reversal thus restores the case to its procedural posture before the jury verdict for purposes of evaluating [the defendant’s] eligibility for pretrial mental health diversion. At that point, [the defendant] faced a mere allegation of a prior strike, which was insufficient to preclude a suspended sentence or diversion. (§ 667, subd. (c)]”)” (*People v. Burns* (2019) 38 Cal.App.5th 776, 789.

The reasoning of *Burns* applies here. The court found defendant had a prior strike conviction after the jury convicted him on the current aggravated assault charge. But under the conditional reversal procedure of *Frahs*, defendant must be treated as though he had not been convicted on the current charge *and did not have a prior strike*. Thus, defendant’s prior strike does not render him ineligible for diversion.

B. Resentencing, If Defendant Is Ineligible for or Does Not Complete Diversion

If, on remand, the court determines that defendant is ineligible for mental health diversion pursuant to section 1001.36, or if defendant commits another crime or does not successfully complete diversion, then the court must reinstate defendant’s convictions and the true findings on his sentencing enhancements. (*Frahs*, *supra*, 27 Cal.App.5th at pp. 792, 796.) Additionally, defendant must be resentenced.

1. Resentencing on Defendant's Prior Serious Felony Conviction

While this case was pending on appeal, the Legislature enacted Senate Bill No. 1393, effective January 1, 2019. (*People v. Garcia, supra*, 28 Cal.App.5th at pp. 971.) Senate Bill No. 1393 amended sections 667, subdivision (a), and 1385, subdivision (b), effective January 1, 2019, to give courts discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia, supra*, at p. 971.) That is, courts now have discretion not to impose a five-year term on a defendant's prior serious felony conviction. (*Ibid.*) When defendant was sentenced on May 24, 2018, the court was required to impose a five-year term on his prior serious felony conviction. (*Ibid.*; former §§ 667, subd. (a), 1385, subd. (b).) Senate Bill No. 1393 is retroactive; it applies to all case that were not final when it went into effect on January 1, 2019. (*People v. Garcia, supra*, at pp. 971-973.) Because defendant's case was pending on appeal when Senate Bill No. 1393 went into effect on January 1, 2019, it retroactively applies to defendant's case.

“Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.’ [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

Remand for resentencing on defendant's prior serious felony conviction would not be futile. The trial court did not clearly indicate that it would not have exercised its discretion to strike the prior serious felony conviction for sentencing purposes if it had had the discretion to do so at the time it sentenced defendant. Rather, the court's comments regarding its wish that it had other sentencing options, including mental health treatment, show that it was looking for other sentencing options for defendant.

2. Defendant Is Entitled to 1,690 Days of Presentence Custody Credits

If defendant is resentenced, the court must also amend the judgment to award him two additional days of presentence custody credits. (§§ 2900.5, 2933.1.) For the reasons defendant claims and the People agree, defendant was entitled to 1,690 days of presentence custody credits at the time he was sentenced on May 24, 2018, but he was awarded only 1,688 days of presentence custody credits. Thus, at resentencing, defendant must be awarded 1,690 days of presentence custody credits as of May 24, 2018.

III. DISPOSITION

The judgment is conditionally reversed. The matter is remanded to the trial court with directions to conduct a mental health diversion eligibility hearing pursuant to section 1001.36. If the court finds the statutory criteria are met, it may grant diversion, and if defendant successfully completes diversion, the court shall dismiss the charges.

If, however, the court determines that defendant is not eligible for mental health diversion pursuant to section 1001.36, or if defendant commits a new crime or does not successfully complete the diversion program, the judgment of conviction shall be reinstated

and defendant must be resentenced. At resentencing, the court is directed to exercise its discretion whether to impose a five-year term on defendant's prior serious felony conviction. (§§ 667, subd. (a), 1385.) The court is further directed to modify the judgment to award defendant two additional days of presentence custody credits as of May 24, 2018: 1,690 days, rather than the 1,688 days defendant was awarded at the original sentencing hearing on May 24, 2018. (§§ 2900.5, 2933.1.) Lastly, if defendant is resentenced, the court is directed to prepare a supplemental sentencing minute order together with an amended abstract of judgment and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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FIELDS

J.

We concur:

MILLER

Acting P. J.

RAPHAEL

J.